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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

JUN 30 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
for Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy
PUBLIC COPY

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is a party rentals firm. It seeks to employ the beneficiary permanently in the United States as a transportation manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also concluded that the petitioner had failed to establish that the beneficiary had the requisite four years of employment experience as a transportation manager required by the offered position.

On appeal, counsel submits additional evidence. Counsel asserts that the petitioner has established that it has the financial ability to pay the proffered wage and that the beneficiary is gathering more evidence related to his past work experience.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) also states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) further provides:

> *Other documentation—*
>
> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience,

> and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Eligibility in this case rests both upon the petitioner's ability to pay the wage offered as of the petition's priority date and whether the petitioner has established that the beneficiary possesses the requisite employment experience required by the terms of the labor certification. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is April 24, 2000. The beneficiary's salary as stated on the labor certification is $14.51 per hour or $30,180.80, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1979 and has 300 employees. Part B of the labor certification, which was signed by the beneficiary in March 2000, reflects that the petitioner employed the beneficiary from 1991 until 1998.

As evidence of its ability to pay the proffered wage, the petitioner, through counsel, initially submitted copies of three financial statements. They purport to represent the petitioner's financial status in 1999, 2000, and 2001. Each of the three respective cover letters, submitted by the accounting firm of [redacted] state that the financial statements have been reviewed, although not audited. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. The regulation neither states nor implies that unaudited financial statements are an acceptable substitution.

On January 7, 2003, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director instructed the petitioner to provide a letter from the petitioner's financial officer confirming that, as an employer of at least 100 employees, the petitioner has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). The director also requested that the petitioner provide evidence from a previous employer establishing that the beneficiary possesses sufficient work experience to satisfy the terms of the approved labor certification. The labor certification, item 14, requires that the beneficiary have four years of experience as a transportation manager. As evidence of this experience, the petitioner initially submitted a letter, dated July 1, 2000, signed by Lic. [redacted] Human Resources, from a company named "York Mexico," located in Durango, Mexico. [redacted] states that York Mexico employed the beneficiary from January 7, 1987 until March 5, 1990 as a transportation superintendent, although the original Spanish version of the letter appears to state that the beneficiary was employed as a "production" supervisor.

In response to the director's request for additional evidence, counsel resubmitted a copy of the petitioner's 2001 financial statement and an employment verification letter. This letter, dated February 2, 2003, is also from York Mexico. It is signed by [redacted] Human Resources Manager. Although the letter confirms that the beneficiary was employed as a transportation supervisor, it states that the commencement of his employment was February 7, 1987, rather than January 7, 1987.

The director denied the petition, in part concluding that the petitioner's financial statements represented internally generated compilations, and as such, could not be viewed as reliable proof of the petitioner's ability to pay the proffered wage. The director also concluded that the petitioner had not established that the beneficiary had accrued four years of experience as a transportation manager as of the visa priority date of April 24, 2000.

On appeal, counsel again resubmits a copy of the petitioner's financial statement covering the petitioner's financial data for the year ending December 31, 2001. Counsel also submits a letter, dated April 7, 2003, from the petitioner's vice-president [redacted] confirms that the petitioner has 300 employees, has been in business for over 24 years, has more than adequate cash reserves, and has a well-established customer base [redacted] states that the petitioner has the ability to pay the beneficiary's proffered wage. Counsel submits no evidence establishing that the beneficiary has four years of experience as a transportation manager. Rather, counsel's cover letter, accompanying the appellate submissions, merely states that the "foreign worker has advised us that there are typographical errors in the letter issued by his employer. The foreign worker is making every attempt to gather further evidence to substantiate that he has the experience required."

Although the AAO concludes that [redacted] letter appears to satisfy the regulatory requirement that the petitioner has the ability to pay the proffered wage, the AAO concurs with the director's conclusions regarding the inadequacy of proof related to the beneficiary's qualifying work experience. As noted by the director, the translation [redacted] letter was flawed as to dates of the beneficiary's employment with York Mexico, but observed that this was an insignificant error. It does not affect the unavoidable conclusion that both letters only purport to establish that the beneficiary worked for York Mexico for slightly more than three years, rather than the four years required by the terms of the labor certification. Of more concern is the discrepancy between [redacted] description of the beneficiary's job as being in production and [redacted] letter describing the beneficiary's job as being in transportation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *See Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

Finally, it is noted that counsel's statement regarding the beneficiary's efforts to gather more evidence to substantiate his past employment does not mitigate the petitioner's obligation to establish a beneficiary's eligibility at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak,* 14 I&N 45, 49 (Comm. 1971). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) requires that a petitioner submit letters from trainers or employers asserting sufficient specificity to establish that a beneficiary has met the educational, training or work experience required by the terms of the individual labor certification.

In this case, the petitioner has failed to persuasively establish that the beneficiary possesses four years of experience as a transportation manager, as required by the terms of the approved labor certification. Without such evidence, the petitioner has not established that the beneficiary qualifies for the visa classification of skilled worker as defined in the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.